No. 82-5646

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

LEROY CHASSON
Petitioner

V.

JOSEPH PONTE and
FRANCIS X. BELLOTTI
Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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CASES

QUESTIONS PRESENTED

Where a state defendant seeks federal habeas corpus relief on the basis of a general instruction on intent which is claimed to have shifted the burden of proof, is it proper to consider other aspects of the charge in order to determine whether the challenged language had the claimed effect.

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OPINIONS BELOW, JURISDICTION AND CONSTITUTIONAL PROVISIONS INVOLVED

The opinions below, jurisdiction, and constitutional provision involved are set forth adequately in the petition.

STATEMENT OF THE CASE

Respondents concur with the statement of the case set forth in the petition except that they dispute the assertion that the challenged instruction relieved the Commonwealth's burden of proof or shifted the burden of proof in violation of petitioner's Fourteenth Amendment due process right. This claim was rejected by the court below.

REASONS WHY THE PETITION IS OPPOSED

I. THE JURY WAS NOT INSTRUCTED TO PRESUME AN ELEMENT OF THE CRIME.

The instruction on intent, which is the subject of this petition was hardly a clear conclusive or burden-shifting presumption of that element. Although the trial court used the words "by the law presumed," the "presumption" was qualified by the explanation: "these must have been within his contemplation, if he is a sane man and acts with the deliberation which ought to govern men in the conduct of their affairs." (emphasis added). The jurors therefore were likely to interpret this as requiring a finding of such deliberation before the "presumption" could be employed, and thus permitting the jury to not find intent.

The First Circuit did not determine whether the jurors alternatively might have interpreted this instruction, standing alone, as relieving the Commonwealth of its burden of proof on intent, because it found that another aspect of the charge precluded such an interpretation. Specifically, the jurors were instructed that in order to find petitioner guilty of first degree murder, they had to find deliberate premeditation. On this point, the court stated:

> [O]ur Courts have said that deliberate premeditation does not require any particular time. The word, "deliberately," in the phrase, "deliberately premeditated malice aforethought," refers to the prior formation of a purpose to kill rather than to any definite length of time. And upon evidence that there was a sequence of events, the jury can find or not find, depending upon your view, whether there was deliberate premeditation to do a certain act. It is not a matter of time. It can be long or short. It can be as short as it requires a person to make an intent, to intend to do something. And if he does that, it could be found by you, but it is for you to say whether it is deliberately premeditated.

Unlike general instructions on the prosecution's burden of proof and the presumption of innocence which in Sandstrom v. Montana, 442 U.S. 510, 518, n.7 (1979) were found insufficient to remove the potential constitutional error, the instructions on deliberate premeditation in Chasson's trial were "rhetorically inconsistent" with an unconstitutional presumption of intent and therefore did preclude, or "cure" such a presumption.

The instruction on deliberate premeditation required the jurors to find "the prior formation of a purpose to kill," which is a much more specific mental state than the mere intention of the consequences of one's acts. In view of the reference to evidence upon which this element could be found, as well as the reminder that the jury did not have to find this element, there is no possibility that the jury was under the impression that upon proof that the death was an "ordinary and natural consequence" of defendant's acts, they had no choice but to find the requisite mental state. Cf., Sandstrom, supra, at 517. Moreover, the jurors were charged on second degree murder, manslaughter (both voluntary and involuntary), and self-defense, further ensuring that they understood the varying degrees and nature of the intent element on which the Commonwealth bore the burden of proof, and understood their obligation to decide these issues.

II. THE CASE PRESENTS NO UNRESOLVED QUESTION OF CONSTITUTIONAL LAW.

Petitioner claims that because it is possible that the challenged instruction, standing alone, might have been interpreted by the jury as describing an unconstitutional presumption, he should have been granted the relief sought. He asserts that the court below erroneously considered the effect of other aspects of the charge, and that the propriety of this approach presents an unresolved question of constitutional law.

Of course, it is axiomatic that instructions are to be evaluated "in the context of the overall charge," and should not be "judged in artificial isolation." Cupp v. Naughten, 414 U.S. 141, 147 (1973). Although this principle was not explicitly restated in Sandstrom, nothing in the reasoning or holding of that case suggests that the principle was overlooked or considered inapplicable. Thus, it appears that the issue presented by petitioner has already been resolved by the opinions of this Court, and that the First Circuit decision in petitioner's case is consistent with the reasoning and holdings of those opinions.

III. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS ON THE ISSUES RAISED IN THE PETITION.

Although petitioner claims that there is a conflict among the Circuit Courts as to whether a potential Sandstrom error may be "cured" by other jury instructions, it is submitted that this supposed "conflict" is merely a difference in result, and is to be expected when a case-by-case analysis is employed. In cases reviewing charges analogous to the one here under consideration, the courts have found no constitutional error. See, e.g., Nelson v.

Scully, 672 F.2d 266 (2d Cir. 1982), cert. denied, 102 S.Ct. 2301 (1982); Pigee v. Israel, 670 F.2d 690 (7th Cir. 1982). In cases more similar to Sandstrom, on the other hand, where no other aspect of the charge eliminated the risk of constitutional error, the courts have been willing to grant relief. See, e.g., United States v. Williams, 665 F.2d 107 (6th Cir. 1981); Dietz v. Solem, 640 F.2d 126 (8th Cir. 1981). Even in such cases, however, the courts usually acknowledge the need to consider the charge "as a whole." See, e.g., Dietz v. Solem, supra at 130-131; Harless v. Anderson, 664 F.2d 610 (6th Cir. 1982), rev'd on other grounds, 51 U.S.L.W. 3336 (11/1/82). The Circuit Courts obviously understand the continuing validity of Cupp v. Naughten and the applicability of that decision in determining whether a Sandstrom error occurred at trial. No purpose would be served by another Supreme Court pronouncement of these fundamental principles.

CONCLUSION

For the reasons stated, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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NOTICE OF FILING/CERTIFICATE OF SERVICE

To my knowledge the attached Brief for the Respondent in Opposition was deposited this date in a United States mail box in Boston, Massachusetts with first-class postage prepaid, addressed to the Clerk, United States Supreme Court.

To my knowledge, a copy of the Brief for the Respondent in Opposition was deposited this date in a United States mail box in Boston, Massachusetts addressed to Robert L. Sheketoff, Zalkind, Zalkind & Sheketoff, 65a Atlantic Avenue, Boston, Massachusetts 02110, counsel of record for the petitioner.

Barbara A.H. Smith
Assistant Attorney General
Chief, Criminal Appellate Division

Subscribed and sworn to before me this 29th day of November, 1982.

Notary Public

My commission Expires: March 10, 1983